Supreme Court, U.S.
FILED
AUG 26 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-32

CURTIS C. FLOOD,

Petitioner,

v.

BOWIE K. KUHN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION*

Opinions Below

The opinion of the United States District Court for the Southern District of New York (App. B of Petition) is reported at 316 F. Supp. 271 (1970). The opinion of the Court of Appeals for the Second Circuit (App. A of Petition) is now reported at 443 F.2d 264. Interlocutory opinions of the United States District Court for the Southern District of New York are reported at 309 F. Supp. 793 (1970) and 312 F. Supp. 404 (1970).

* The Commissioner of Baseball, Bowie K. Kuhn, is joined as a defendant in only the first alleged cause of action, the federal antitrust claim. Counsel for the Commissioner therefore join in this brief only to the extent that it deals with that claim.

Questions Presented

1. Should this Court overturn its decision in *Toolson* v. *New York Yankees, Inc.* 346 U.S. 356 (1953), holding that professional baseball is not within the scope of the federal antitrust laws unless and until the Congress determines otherwise, when the history of Congressional consideration of baseball supports the continuation of that exemption?

2. Should the nationwide framework of baseball which is the subject matter of this action be made subject to regulation under the antitrust laws of the various states in which baseball operates?

Constitutional and Statutory Provisions Involved

The pertinent provision of the Sherman Act (15 U.S.C. § 1) is set forth in Appendix D to the Petition. Also involved are Article I, Section 8 and Article VI, clause 2 of the United States Constitution which are set forth in Appendix A annexed hereto.

Statement of the Case

The Facts

On or about October 8, 1969, the player contract of Petitioner, Curtis C. Flood, was assigned by the St. Louis Cardinals to the Philadelphia Phillies, pursuant to existing baseball rules and the terms of his contract. The assignment of Mr. Flood's contract was part of a multi-player transaction which included the assignment of other player contracts between the Phillies and the Cardinals.

Mr. Flood refused to honor the assignment of his contract and, on December 24, 1969, he asked the Commissioner of Baseball to advise all of the major league clubs that he was entitled to negotiate with all clubs in both of the major

leagues. The Commissioner responded by advising Mr. Flood that since his contract had been properly assigned in accordance with its provisions, his request could not be granted. Thereafter this action was commenced and Petitioner declined the Commissioner's invitation to discuss the matter further (Tr.* 136-37).

Petitioner, through his attorneys, who had been retained for him by the Major League Baseball Players Association, repeatedly refused to play during the 1970 season, at the $100,000 salary offered by the Philadelphia club, despite Respondents offer that he could play without prejudice to this action (Tr. 372-73). After the close of the 1970 season, the Philadelphia club assigned the rights to Mr. Flood's contract to the Washington Senators. In November 1970 Petitioner and the Washington club entered into a contract whereby Mr. Flood agreed to play for the Senators during the 1971 baseball season for a salary of $110,000. By agreement among the parties this was without prejudice to Petitioner's rights in this litigation. However, on April 27, 1971 Mr. Flood left the Washington club despite the club's objections, citing personal reasons, and has not played since that date.

The Complaint

Petitioner's complaint, insofar as it pertains to questions presented to this Court, consists of allegations that baseball's reserve system constitutes a conspiracy among the Respondents to boycott Petitioner in violation of the Sherman Act (Complaint, par. 22). In addition, in causes of action directed against only eleven of the twenty-four club Respondents and none of the individual Respondents, Petitioner contends that the reserve system and the Respondents' practices thereunder constitute violations of the

* Refers to trial transcript as originally paginated.

laws of New York, California and the "several states" in which major league baseball is played (Complaint, par. 28).

The Proceedings Below

Simultaneously with the service of the Complaint, on January 16, 1970, Petitioner served an order requiring the club Respondents to show cause why a preliminary injunction should not be entered enjoining them from refusing to offer Petitioner employment. On March 4, 1970, the District Court denied this application with an opinion reported at 309 F. Supp. 793.

On April 23, 1970, the District Court entered an order granting Respondents' motion for summary judgment as to a cause of action involving only two Respondent clubs and deferring action on Respondents' motions to dismiss the remaining causes of action alleged in the Complaint. The District Court observed that, as to the first cause of action, asserting violation of the federal antitrust laws, "plaintiff asserts grounds for overruling *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953), which in our view raise serious questions of a factual nature" and referred to other issues best resolved after consideration of all the facts adduced at trial. 312 F. Supp. at 406.

After a trial which lasted fifteen days, the District Court rendered a decision and entered judgment finding for Respondents on each of the remaining alleged causes of action. The opinion is reported at 316 F. Supp. 271.

The District Court dismissed the federal antitrust claim citing *Toolson* v. *New York Yankees, Inc.*, *supra*, and *Salerno* v. *American League of Professional Baseball Clubs*, 429 F. 2d 1003 (2d Cir. 1970), *cert. denied*, 400 U. S. 1001 (1971).

The District Court also rejected Petitioner's state law claims holding (1) that the application of the state antitrust laws to baseball conflicts with the federal policy manifested by *Toolson* and Congressional consideration of baseball and, therefore, violates the Supremacy Clause of the Constitution (Art. VI, cl. 2), and (2) that "the nationwide character of organized baseball combined with the necessary interdependence of the teams requires that there be uniformity in any regulation of baseball and its reserve system." 316 F. Supp. at 279-80.*

Finally, the District Court pointedly observed that the evidence before it indicated that the issues presented by the Complaint were the kind "best resolved by the parties without outside interference" and that the parties' representatives in collective bargaining, sharing a common interest in the good of the game, were capable of a negotiated resolution of their differences. 316 F. Supp. at 282, 284.

On April 7, 1971, the Court of Appeals for the Second Circuit unanimously affirmed the District Court's decision (1) as to the federal antitrust claim, on the authority of *Toolson* v. *New York Yankees, Inc., supra,* and *Salerno* v. *American League of Professional Baseball Clubs, supra,* and (2) as to the state law causes of action, because the extra-territorial effect of state regulation on the multi-state structure of baseball would constitute an impermissible burden on interstate commerce. 443 F.2d at 267-8.

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* The District Court also rejected Petitioner's Thirteenth Amendment arguments because he was free not to play professional baseball and thus there was no compulsion, a prerequisite of involuntary servitude. 316 F. Supp. at 280-82. The Court of Appeals affirmed the District Court's decision and the Petition does not present the Thirteenth Amendment contentions to this Court.

ARGUMENT

I.

This Court Has Held That The Business Of Baseball Is Not Subject To The Federal Antitrust Laws, Unless And Until The Congress Determines Otherwise.

A. *Since 1922 Baseball Has Been Held Not Subject To The Federal Antitrust Laws.*

Ever since *Federal Baseball Club of Baltimore* v. *National League,* 259 U. S. 200 (1922), professional baseball has been held not subject to the operation of federal antitrust laws.

In 1953, in *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356 (1953), an action like this one by a player challenging baseball's reserve system, this Court affirmed baseball's antitrust exemption as follows:

> "In *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs,* 259 U. S. 200 (1922), this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without reexamination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore* v. *National League of Profes-*

> *sional Baseball Clubs, supra,* so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U. S. at 356-57.

Subsequent decisions of this Court have reaffirmed the rationale of *Toolson*. In 1955 this Court, in two different cases, restated the proposition that if the business of organized baseball is to be brought within the scope of the federal antitrust laws, the Congress, and not the Courts, must do it. *United States* v. *Shubert*, 348 U. S. 222 (1955); *United States* v. *International Boxing Club of New York*, 348 U. S. 236 (1955).

In 1957, this Court held that professional football was subject to the antitrust laws and that the rule established in *Federal Baseball* and *Toolson* was to be limited to organized baseball. *Radovich* v. *National Football League*, 352 U. S. 445 (1957). With respect to the *Toolson* rule, the Court said that: "[a]s long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the [Sherman] Act made in those cases." 352 U. S. at 451. In considering the issue of whether discrimination in favor of baseball was not created by such a ruling, this Court referred again to the role of the Congress:

> "We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by Court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action. Of course, the doctrine of *Toolson* and *Federal Baseball* must yield to any congressional action and continues only at its sufferance. This is not a new approach." (Footnote omitted.) 352 U. S. at 452.

These opinions made it manifest that baseball was considered to be engaged in interstate commerce and fully subject to any appropriate federal regulation which might be enacted. Both the District Court and Court of Appeals recognized this fact and Respondents make no argument to the contrary.

But Petitioner continues to argue that baseball claims immunity from both federal and state law and that the Respondents cannot have it both ways and be immune from all regulation (Petition, pp. 19-20). This contrived contention is simply answered: Congress can assert federal regulatory power over baseball at any time.

B. *Congress Has Considered Baseball's Exemption And Determined Not To Disturb It.*

The Petition is devoid of any reference to the extensive Congressional examination of baseball since *Toolson* and disregards this Court's determination that Congress is the proper forum for any reconsideration of baseball's status.

Since November 1953, when the *Toolson* opinion was handed down, there have been over 50 bills introduced into Congress dealing with the applicability of the antitrust laws to organized baseball. Since the *Radovich* decision in 1957 more than eight separate Congressional hearings, totaling more than forty days of testimony, have been held.*

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* *See, e.g., Hearings on H.R. 5307, et al., Before the Antitrust Subcomm. of the House Judiciary Comm.*, 85th Cong., 1st Sess. (1957); *Hearings on H.R. 10378 and S. 4070 Before Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 85th Cong., 2nd Sess. (1958); *Hearings on S. 616 and S. 886 Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 86th Cong., 1st Sess. (1959); *Hearings on S. 3483 Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 86th Cong., 2d Sess. (1960); *Hearings on S. 2391 Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 88th Cong., 2d Sess. (1964); *Hearings on S. 950 Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 89th Cong., 1st Sess. (1965).

Baseball's antitrust exemption has continued unchanged throughout this thorough Congressional examination. In fact, the result of such Congressional activity has been a repeated reaffirmation of baseball's position. The only two bills which have passed either house (H.R. 10378, 85th Cong. 2d Sess. (1958); and S. 950, 89th Cong. 1st Sess. (1965)) both provided broad antitrust exemptions to the principal professional league sports, including a specific exemption with respect to "the employment, selection or eligibility of players, or the reservation, selection, or assignment of player contracts."* As the Senate Committee on the Judiciary concluded in its 1965 report on a proposed "Professional Sports Act": the antitrust exemption for a reserve system is "necessary to maintain competitive equality among the member clubs and leagues." Senate Report No. 462, 89th Cong. 1st Sess. (1965), p. 13. When Congress has enacted legislation in the professional sports area, the effect of such legislation has been to codify or grant an antitrust exemption, not eliminate it. Sports Broadcasting Act of 1961, 15 U.S.C. § 1291-95; professional football merger authorization of 1966, 15 U.S.C. § 1291.

This situation is not even remotely like those presented by *Blonder-Tongue Labs* v. *University of Illinois Foundation*, 402 U. S. 313 (1971) and *Boys Markets, Inc.* v. *Retail Clerks Union Local 770*, 398 U. S. 235 (1970), where this Court concluded that the failure of Congress to enact legislation contrary to certain earlier decisions of the Court did not provide a sufficient reason for refusing to reconsider such decisions. In neither *Blonder-Tongue Labs* nor *Boys Markets* did this Court expressly invite Congressional attention to the subject or indicate that the ruling of the Court would stand unless and until Congress determined otherwise. Nor in either case was there a history of Con-

* Neither of these bills came to a vote in the other house of Congress.

gressional consideration focused precisely on the issue and a record of Congressional committee findings favorable to the Court rulings in question. Moreover, in neither case were there considerations of reliance and retrospective application such as motivated the Court in *Toolson* to defer to the more accommodative legislative processes.

By contrast, this Court's express invitation to Congress to reconsider the *Toolson* exemption, the extensive and favorable consideration of baseball by Congressional committees and the failure of Congress to enact legislation disturbing baseball's exemption are highly significant and provide solid support for the continuation of the *Toolson* ruling. The District Court recognized this significance and quoted with approval these words of the Wisconsin Supreme Court, in *Wisconsin* v. *Milwaukee Braves, Inc.*, 31 Wisc. 2d 699, 144 N.W. 2d 1, 16-18, *cert. denied*, 385 U. S. 990 (1966), on the subject:

> "'It is plausibly argued that silence of Congress in this context demonstrates congressional recognition that league structure and the related agreements and rules are integral parts of professional baseball as it exists, and that the application of the familiar type of antitrust legislation to the structural arrangements of organized baseball is inappropriate; . . . that there is to be self-regulation until such time as Congress decides that the public interest requires other control.'" 316 F. Supp. at 279.

C. *Baseball Has Grown And Developed In Reliance Upon Its Exemption.*

Also central to this Court's decision in *Toolson* was recognition of the reliance interests which would be jeopardized by a repudiation of baseball's exemption:

> "The business [of baseball] has . . . been left for thirty years to develop, on the understanding that it

was not subject to existing antitrust legislation." 346 U. S. at 357.

In *Radovich,* the Court reiterated this point:

> "Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years." (Footnote omitted.) 352 U. S. at 450-51.

There have been seventeen more years of growth and expansion of baseball, in reliance on *Toolson,* since that decision by this Court in 1953. Baseball clubs have continued since *Toolson* and *Radovich* to invest millions of dollars in player contracts and other baseball assets (Plaintiff's Exs. 10-11), long term stadium leases have been entered into (Tr. 1302, 1454-58, 1752), new franchises have been acquired at costs reaching ten million dollars each (Plaintiff's Exs. 10-11) and countless other commitments have been made, all with awareness of and reliance upon baseball's antitrust exemption and in particular upon the validity of baseball's reserve system.

The testimony of various officers of club Respondents, Francis Dale of Cincinnati (Tr. 1239-44), John McHale of Montreal (Tr. 1313-19), Robert Reynolds of California (Tr. 1358-60) and Ewing Kauffman of Kansas City (Tr. 1451-53), all men who have purchased or participated in the purchase of major league clubs since *Toolson,* was unanimously and pointedly to the effect that the investments which they had made in baseball would never have

been made if the baseball business had not been protected by the *Toolson* ruling.

As Judge Moore, concurring below, noted:

> "Just as the Supreme Court in 1955 recognized that baseball 'had grown and developed' and 'in reliance on the *Federal Baseball* precedent,' *United States* v. *Shubert, supra,* 348 U. S. at 229, so much more has it grown between 1955 and 1971. The eight teams in each league have been expanded to twelve. . . . The reasons for adopting a 'hands off' policy by the courts of this particular sport have multiplied." 443 F.2d at 272.

In an attempt to overcome this obstacle to his assault on *Toolson,* Petitioner says that he seeks only prospective relief which would, he contends, eliminate the injustices of retroactivity and surprise referred to in the *Toolson* and *Radovich* decisions (Petition, p. 12). But no prospective decree of the nature sought by Petitioner, declaring him a free agent able to negotiate with all clubs, could fail to have enormous impact upon the reliance interests which *Toolson* protects. The grant of such relief to Petitioner would surely invite similar suits by other players and would profoundly disturb the structure and organization of professional baseball. The District Court rejected Petitioner's argument noting that "we do not believe the 'prospective' overruling suggested by plaintiff would vitiate all of these underpinnings of *Toolson*" (309 F. Supp. at 805) and that such relief would be "unprecedented" and "might still have a serious retrospective effect on the reliance interests of baseball. . . ." 316 F. Supp. at 277.

D. *The Changes In Baseball Since 1953 Support, Rather Than Undermine, The* Toolson *Ruling.*

Petitioner alleges that the changes in baseball since 1953 indicate that *Toolson* should be overturned because "baseball has become ever more commercial, and the reserve system, more restrictive" (Petition, p. 11). Yet, although a trial was ordered by the District Court in order to afford Petitioner an opportunity to produce proof as to these alleged changes (312 F. Supp. at 406), the evidence adduced at trial demonstrated that there were no changes in baseball's operations since 1953 which supported Petitioner's complaint or which indicated that baseball had abused the *Toolson* ruling.*

Indeed, the most important change in baseball's operations demonstrated at trial concerned the impact of the Players Association and the intensive collective bargaining which has taken place since the reorganization of that Association, with a full-time professional Executive Director and counsel, in 1966. Since that date, the Players Association has actively represented the players and negotiated with the baseball clubs concerning mandatory subjects of bargaining under the National Labor Relations Act. In addition, through collective bargaining, an elaborate grievance procedure has been set up for the processing of player grievances by a third party arbitrator appointed jointly by the Players Association and the clubs.

The Respondents, as well as the Players Association, concede that the reserve system is a mandatory subject of bargaining. 316 F. Supp. at 283. Accordingly, the establish-

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* Petitioner did refer at trial to the adoption by baseball in 1965 of a free agent draft, to which he had never been subject. This draft is merely a less restrictive version of the college player drafts in effect for years in other sports. Baseball's draft grants six-month negotiating rights to the drafting club while in other sports the rights are perpetual (Tr. 472-73, 524, 582, 690). The District Court found no significance in the adoption by baseball of this draft. 309 F. Supp. 803-04.

ment of formal collective bargaining has given baseball a new and highly significant way of internally generating solutions to problems which, like the subject matter of this action, are really labor-management disputes. In fact, negotiations concerning the very issues involved in this action were in progress at the time the action was commenced (Tr. 1609-15). Far from serving as a catalyst in aid of bargaining as the Petition implies (p. 21, n. 9), this action completely stifled collective bargaining and the possibility of a harmonious resolution of these issues (Tr. 1611-15). The Players' Association and the clubs recognized the impracticability of continuing meaningful bargaining during the pendency of this action and formally agreed that bargaining on the reserve system would be suspended until this action had been finally determined. 316 F. Supp. 283-84, n. 18.

But the collective bargaining process remains the proper means for resolving this dispute. The issue here is not whether the reserve system must be abolished. Petitioner's own witnesses have conceded that baseball would be chaotic without a reserve system (e.g., Tr. 1965), and Petitioner admits that he seeks only the "modification" of the reserve system "so as to legalize it" (Petition, p. 12). But Petitioner at trial and in his briefs has never even suggested which of his proposals, if any, would "legalize" the reserve system in antitrust terms. He has stated, however, that he would be satisfied with a collectively bargained compromise (Tr. 116); and the suggestions made by Petitioner's witnesses at trial—the adoption of salary arbitration, automatic salary progression, limitations on the number of years of the reserve system's application, etc.—are plainly collective bargaining proposals to be negotiated between the club employers and player employees. The real issue is what kind of reserve system is best for the

players and clubs alike, and this is the type of issue best resolved by collective bargaining.

Petitioner attempts to avoid this conclusion by asserting that the club Respondents have never negotiated in good faith on the reserve system (Petition, p. 21, n. 9). But the District Court found otherwise after trial, stating that the history of such negotiations did not support Petitioner's assertion and that the extensive bargaining in prior years had already resulted in player benefits relating to the reserve system. 316 F. Supp. at 283.

Moreover, the District Court concluded after trial that a collectively bargained resolution was best:

> "[W]e are convinced that the conflicts between the parties are not irreconcilable and that negotiations could produce an accommodation on the reserve system which would be eminently fair and equitable to all concerned—in essence, what is called for here is continuity with change."
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> • • • • •
>
> "[W]e believe that here, as well, the parties themselves are best able to reach a satisfactory accord, and that all avenues toward such an approach certainly have not yet been fully exhausted." 316 F. Supp. at 282, 284.

E. *The* Toolson *Ruling Has Not Been Abused By Baseball.*

Throughout the Petition there is the implication that baseball has taken advantage of the *Toolson* ruling and has used it to shield practices highly detrimental to the players. The evidence adduced at trial was quite to the contrary. The District Court's opinion best summarizes this proof:

> "Prior to trial we gained the impression that there was a view, held by many, that baseball's reserve system had occasioned rampant abuse and that it should be abolished. We were struck by the fact, however, that the testimony at trial failed to support that crit-

icism; we find no general or widespread disregard of the extremely important position the player occupies.

Clearly the preponderance of credible proof does not favor elimination of the reserve clause. . . ." 316 F. Supp. at 276.

II.

Neither The Business Of Baseball Nor Its Reserve System Are Subject To State Antitrust Regulation.

There is no tradition or history of state antitrust regulation of baseball. Despite Petitioner's arguments, baseball has consistently been viewed on a national basis.* But Petitioner, contrary to history and the judgment of Congress and the courts, including the District Court and the Court of Appeals in this action, insists that piecemeal state antitrust regulation is appropriate. Indeed, Petitioner even claims that the controlling decisions of this Court require the application of state law to baseball (Petition, p. 13). We can find nothing in the decisions of this Court—*Toolson, Shubert* and *Radovich*—or of any other court which supports this claim. To the contrary, the entire thrust of all these decisions appears to be in the opposite direction. They hold that if regulation is to occur, it is to be federal regulation as determined by Congress.

Thus Petitioner, while trying to suggest that the application of state law here is consistent with the accepted role of state law as a supplement to the federal antitrust laws, is faced with the fact that such application would flatly contradict—not supplement—federal policy. As the

* The NLRB, in asserting jurisdiction over baseball, has noted that: "It is apparent that the Employer (baseball) whose operations are so clearly national in scope ought not to have its labor relations problems subject to diverse labor relations laws." *American League and Ass'n of Umpires,* 180 NLRB No. 30, Case 1-RC-10414 (Dec. 15, 1969).

District Court observed, "enforcement of such state laws would appear to produce a result inconsistent with the objective of the federal antitrust laws interpreted by the Supreme Court as excluding the business of baseball." 316 F. Supp. at 279.

It was this inconsistency which supplied the District Court, following the decision of the Wisconsin Supreme Court in *Wisconsin v. Milwaukee Braves, Inc.*, 31 Wisc. 2d 699, 144 N.W. 2d 1, *cert. denied*, 385 U. S. 950 (1966), with one branch of its dual rationale for denying state regulation. 316 F. Supp. at 279. The Wisconsin court had held that state regulation would interfere with a Congressional policy, implicit from Congressional silence in the particular context, permitting self-regulation of baseball. 31 Wis. 2d at 730, 144 N.W. 2d at 18. In agreeing, the District Court indicated that this Court's decision in *Toolson*, which recognized and protected baseball's reliance interests, was inconsistent with the exposure of those same reliance interests to disruption by state law.

The other rationale of the *Wisconsin* case, also adopted by the District Court, was that "the national character of organized baseball and the necessary interdependence of the teams require a uniformity of regulation" and that "the regulation, if there is to be any, must be prescribed by Congress." 309 F. Supp. at 807.

Petitioner suggests that there has been no showing that state regulation would be non-uniform or burdensome (Petition, p. 16). But after considering the evidence adduced at trial, the District Court found that diverse state regulation would constitute an undue burden upon the interstate business of baseball:

> "We do not believe that the operation of baseball and its reserve system is a matter which admits of diversity of treatment. State and local laws may not unduly burden interstate commerce."

• • • • •

"As we see it, application of various and diverse state laws here would seriously interfere with league play and the operation of organized baseball." 316 F. Supp. at 280.

The Court of Appeals echoed this conclusion, while rejecting Petitioner's suggestion that uniformity could be achieved by compliance with the strictest state standard:

"Professional baseball clubs, although existing as separate legal entities, are organized into so-called leagues for competitive play and are dependent on the league playing schedule to further the ends of their sports competition. Therefore, it is the league structure at which any state antitrust regulation must be aimed if organized professional baseball is not to be severally fragmented. On the one hand, it is apparent that each league extends over many states, and that, if state regulation were permissible, the internal structure of the leagues would require compliance with the strictest state antitrust standard. The consequent extra-territorial effect of necessary compliance would be considerably more farreaching than that in *Southern Pacific Co.* v. *Arizona, supra*. On the other hand, we do not find that a state's interest in antitrust regulation, when compared with its interest in health and safety regulation, is of particular urgency. Hence, as the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce clause precludes the application here of state antitrust law." (Footnote omitted.) 443 F.2d at 267-8.

For a concrete example of the kind of conflict and disruption inherent in state regulation, Petitioner need look no further than the *Wisconsin* litigation, where the Wisconsin trial court ordered a baseball club to return to Milwaukee, a Georgia state court ordered the same club to remain in Atlanta, and the federal district court in Houston enjoined the enforcement of the order of the Wisconsin court. Petitioner's own analysis as set forth in his brief to the Court

of Appeals in this case (pp. 43-45) provides another example. There Petitioner characterized baseball's operations as *per se* violations of the antitrust laws of some states, while noting that the rule of reason would apply in other states. Since Petitioner's witnesses generally conceded the necessity of some form of reserve system (e.g., Tr. 1965), how could the alleged *per se* doctrine fail to conflict with regulation under the rule of reason and prove utterly disruptive to baseball?

In an effort to escape this dilemma, Petitioner argues that state regulation of baseball should be permitted (presumably regardless of the consequences) lest state efforts to protect local citizens be paralyzed by the regulatory bar found by the courts below. Petitioner compares baseball's intricate web of leagues, schedules, rules and regulations to the operations of a "door-to-door seller" and implies that if the "self interest" of baseball should permit it to avoid state antitrust regulation, then the peddler may similarly be able to avoid state consumer protection laws (Petition, p. 18).

This Court provided the answer to the Petitioner's suggestion in *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945), by stating that:

> "When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. . . .
>
> But ever since *Gibbons* v. *Ogden*, . . . the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." 325 U. S. at 767.

The courts below have followed this Court's ruling in *Southern Pacific* by balancing state interests generally (Petitioner has never asserted the interest of any particular state) against the disruption implicit in the state regulation of baseball. Baseball's obvious need for uniform nationwide regulation has been found paramount. We submit that there is no risk that state regulation of the house-to-house salesman will be jeopardized by this continued recognition of baseball's need to be free from the "application of various and diverse state laws." 316 F. Supp. at 280.

CONCLUSION

The issues raised here are long-settled questions which Petitioner seeks to overturn. They are not issues of general importance and there is no conflict among the courts with respect to them. At this Court's invitation Congress has repeatedly considered these issues and found no need for change. Moreover, the subject matter of Petitioner's claim is a mandatory subject of collective bargaining which the representatives of all interested parties are required and prepared to pursue as a part of normal labor-management negotiations.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

August 26, 1971.

Respectfully submitted,

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APPENDIX A

United States Constitution, Article I, Section 8

The Congress shall have Power

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

United States Constitution, Article VI, clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.